PENANG & S. PRAI TEXTILE & GARMENT INDUSTRY EMPLOYEES' UNION

v.

DRAGON & PHOENIX BHD. PENANG & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR
MOHD. YUSOFF MOHAMED J
[ORIGINATING MOTION NO. R8-32-12-88]
23 JANUARY 1989

LABOUR LAW: *Order of certiorari quash award of Industrial Court - Whether Court committed jurisdictional error - Is check-off a trade dispute - Sections 2, 30(5a) of Industrial Relations Act 1967 - Code of conduct for industrial harmony.*

The applicant, and the 1st respondent entered into negotiation for a new collective agreement. The 1st respondent refused to incorporate 'check-off' which was however provided for in the previous collective agreement.

The Minister of Labour referred the ensuing dispute to the Industrial Court under s. 26 of the Industrial Relations Act 1967. The Industrial Court held that check-off is not a trade dispute under s. 2 of the Industrial Relations Act 1967. The applicant argued that by declining jurisdiction in refusing to incorporate the check-off provision the Industrial Court committed jurisdictional error and that the Court failed to give proper interpretation and affect to s. 30(5A) of the Industrial Relations Act 1967.

Held:

[1] The Industrial Court was right in holding that a check-off is not a trade dispute within the meaning of the term as defined in s. 2 of the Industrial Relations Act 1967.

[2] The Industrial Court is barred from incorporating check-off in its award in spite of s. 30(5A) of the Industrial Relations Act 1967 and the Court correctly declined jurisdiction in this case.

[Application dismissed.]

Cases referred to:

Non Metallic Mineral Products Manufacturing Employees Union v. Malaya Glass Factory Bhd. [1984] 1 CLJ (Rep) 305

Legislation referred to:

Industrial Relations Act 1967, ss. 2, 26, 30(5A)

For the applicant - K.P. Gengadharan; Genga Maha Wong & Co.
For the 1st respondent - Andrew Saw; Ng Yook Woon, Andrew T.C. Saw & Co.

JUDGMENT

Mohd. Yusoff Mohamed J:

The only question arising in this motion for an order of *certiorari* to quash the award of the Industrial Court dated 24 December 1987, is whether the Court committed jurisdictional error in holding that check-off is not a trade dispute under s. 2 of the Industrial Relations Act 1967 (the Act).

It is argued firstly that by declining to exercise jurisdiction in refusing to incorporate this check-off provision into the Court's award it has committed jurisdictional error. Secondly, it is said that the Court failed to give proper interpretation and effect to s. 30(5A) of the Act and thus declined its jurisdiction.

This dispute arose from a re-negotiated collective agreement between the applicant trade union representing the workers and 1st respondent, the employer. Check-off provision existed in the previous agreement but upon re-negotiation the 1st respondent refused to accede to incorporate it in the new agreement. Through the relevant Minister the matter was referred to Industrial Court under s. 26 of the Act.

Check-off is a deduction by the management (employer) of trade union subscriptions from employees and remit them to the union by the management. An essential feature of the arrangement is a written consent by the employees for such arrangement.

In *Non-Metallic Mineral Products Manufacturing Employees Union v. Malaya Glass Factory Bhd.* [1984] 1 CLJ (Rep) 305 the then Federal Court had occasion to consider a similar issue and it was held that the Industrial Court acted outside its jurisdiction in ordering the company there to deduct the union's subscription of workers. At p. 307 the Court holds:

> The first is Article 6- "Check off". The appellants thereby sought to get the respondents to deduct union subscriptions from union members who have authorised the company (respondents) to do so. Encik Gangadharan says that this is a continuation of what was already in practice under the previous agreement and therefore cannot be in excess of jurisdiction.
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> On behalf of respondents it was argued that this item is not a trade dispute as defined in s. 2 i.e. it is not connected with the employment or non-employment or the terms of employment or the conditions of work. It is not a condition of service. The previous collective agreement continued Encik Chelliah, was a separate matter so that the Court acted in excess of jurisdiction.
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> He cited *The Queen v. Portus & Anor.* as authority for the proposition that consensual practice of employees and employers cannot expand the jurisdiction of the tribunal. We are inclined to agree with him, and would hold that the Tribunal was, on this matter, acting outside its jurisdiction.

Relying on the *Non-Metallic Mineral* case the Industrial Court in this case rejected the applicant's claim. I am in agreement with the Industrial Court. The decision of the Federal Court in *Non- Metallic Mineral* case is binding on the Industrial Court and indeed on this Court as well.

Now, the learned Counsel on behalf of applicant contends that *Non-Metallic Mineral* case is no longer good law as the Federal Court was concerned only with the state of the law prior to May 1980 that was when the amendment to the Act was effected.

I do not agree with the learned Counsel's view. The Federal Court's concern with the state of law prior to May 1980 as expressly stated in the judgment relates to s. 32(3)(a) only. That provision dealt with finality of the Industrial Court award which was then repealed by May 1980 amendment. In my opinion that amendment to s. 32(3)(a) has no relevance to the similar issue decided there.

Another amendment to the Act in May 1980, which is relevant to this case relates to the definition of the words "trade disputes" in s. 2 of the Act. The amendment takes away from the definition the disputes as between workmen and workmen and between employers and employers but retains trade disputes as between employer and his workmen. The 1980

amendment thus confined the Industrial Court's jurisdiction to disputes between employers and workmen only. The present case is such a dispute. With respect and in this view, the *Non- Metallic Mineral* case is still binding and the Industrial Court award is correct.

On the second argument that the Industrial Court failed to give proper interpretation and effect to s. 30(5A) of the Act and thus declined jurisdiction, the learned Counsel placed heavy reliance on the Code of Conduct for Industrial Harmony which was approved by the Minister in 1975.

Code 35 of that Code of Conduct states that collective agreement **may** also cover such matters as:

(c) the deduction by management of trade union subscription etc. from employees' wages;

Although such matters as check-off is expressly provided in the Code of Conduct for Industrial Harmony, its acceptance is voluntary. This is so expressed by the Minister in his foreword to the Code. There is no legal force or sanction for failing to accept such code of conduct and Code 35 itself is expressed in permissive terms and in my view it would be futile for the applicant to enforce the term of checkoff, which they had themselves to consent in writing, on the 1st respondent without its agreement.

As regards the Industrial Court interpretation of s. 30(5A) of the Act, the section only allows the Court to consider any agreement or such code of conduct in its award. But again the section speaks in permissive terms and in interpreting it, the Industrial Court adopted the 1st respondent's contention that the section does not alter the position, that a check-off is not a trade dispute within the meaning of the term as defined in s. 2 of the Act and therefore the section does not confer extra jurisdiction on the Court to award check-off.

I am, again, in agreement with the Industrial Court that in view of the *Non-Metallic Mineral* case on check-off, the Industrial Court is barred from incorporating it in its award inspite of s. 30(5A) of the Act. I hold that the Industrial Court has correctly declined jurisdiction in this case.

For these reasons I dismissed this application.

Also found at [1989] 1 CLJ 802